

FAMILY LAW UPDATE

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THIRD PARTY CUSTODY

CONSIDER

- ◉ Same sex domestic partnership
- ◉ Twin children born through artificial insemination
- ◉ Years later, couple separates
- ◉ Non-bio partner seeks custodial rights
- ◉ How do you decide?

MASON AND ESTROFF (AND PRICE)

- Parent may waive constitutional protection if voluntarily chose to create a family unit and permanently cede to third party a significant amount of parental responsibility and decision-making authority to create parent-like relationship between third party and child

MASON AND ESTROFF

- Focus is not on whether conduct consisted of “good acts” or “bad acts”; rather volitional acts of the parent that relinquish otherwise exclusive authority to third party
- Need to consider both conduct and intent of parent

HEATZIG V. MACLEAN

○ Trial court said:

- Bio mom did not act inconsistent with protected status
- Bio mom did abrogate her primary right to custody
- Non-bio partner should be granted “parental status”

HEATZIG V. MACLEAN

- Court of Appeals said:
 - Fitness not the same as inconsistent conduct
 - Bad conduct or unfitness is not required
 - Question is intent by parent to create family
 - Did she cede authority to third party?

SUPPORTING WAIVER

- ◉ Joint decision to become pregnant
- ◉ Sperm donor selected to share characteristics of non-bio partner
- ◉ Names of children
- ◉ Joint participation in parenting class
- ◉ Both present at birth
- ◉ Both signed birth certificate application
- ◉ Baptism ceremony
- ◉ Shared health care authority

AGAINST WAIVER

- Bio mom had been trying to have children before this relationship
- Bio mom made timing/methodology decisions alone
- Couple did not create parenting agreement

PARENT BY ESTOPPEL

- “A flawed and non-existent legal theory”
- District court is “without authority to confer parental status upon a person who is not the biological parent of a child”
- Adoption is the “sole means of creating the legal relationship of parent and child”
 - *Heatzig v. Maclean*

SURROGACY CONTRACTS

- Pre-birth orders?????
- Traditional surrogacy
 - Probably not
- Gestational surrogacy
 - Maybe, but maybe not

CONSIDER

◉ Custody order provides:

- “Joint custody”
- Every other weekend to dad
- Reasonable telephone contact for both
- Joint decision-making
- Notify each other re: medical emergencies

CONSIDER

- Contempt order against mom - jail time suspended on condition that:
 - Mom and dad talk before making decisions
 - During mom's time, mom will schedule activities Dad must stay away unless invited
 - Mom makes medical decisions when child with her
 - Mom and dad shall not speak at exchanges
- Okay?

JACKSON V. JACKSON

- ⦿ Cannot modify custody order unless motion to modify is filed by a party
- ⦿ Court cannot modify on own motion
- ⦿ Court cannot modify to punish contempt

PARENTING COORDINATOR

- Court can appoint coordinator on own motion
 - GS 50-91(b)
- Must find:
 - High conflict
 - Ability to pay
 - Best interest

CONTEMPT FOR VISITATION PROBLEMS

- ◉ Appropriate when parent prevents visitation
- ◉ Probably not when parent fails to facilitate visitation (unless specifics in order)
- ◉ Purge conditions must be specific and clear
- ◉ No jail unless necessary to protect best interest of child
 - See Bench Book Custody Chapter pp 4-57

CHILD SUPPORT

CONSIDER

- ◉ Dad receives \$125,000 workers' compensation settlement
- ◉ Seven months later - hearing on motion to modify
- ◉ Is settlement included as dad's present actual income?

INCOME FROM ANY SOURCE

- ▣ Long list in guidelines
- ▣ Income received on “irregular, non-recurring or one-time basis”
- ▣ Court may “average or pro-rate the income over a specified period”, or
- ▣ “Require obligor to pay a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.”
 - *See Spicer* (settlement proceeds)
 - *Cf. Glass* (bonuses)

FELTS V. FELTS

- ◉ \$125,000 workers' compensation settlement all counts as actual income
- ◉ Okay to average income over 17-month period before settlement and 12-month period following receipt of settlement

MODIFICATION

- ◉ Requires change since last non-temporary order
- ◉ Motion needs detail
- ◉ Change in income not enough alone
 - *Devaney v. Miller*
 - Unless 3 year / 15% rule applies?

PATERNITY

- ⊙ Award of reasonable attorney fees allowed as part of costs in discretion of court
 - GS 6-21(10)
 - NOT pursuant to GS 50-13.6
- ⊙ But maybe not against mom??
 - *Guilford Cty ex. rel Holt v. Puckett*

ALIMONY

CONSIDER

- ⦿ Adult son living in basement apartment in mom's house (dependent spouse)
- ⦿ Is rental value considered mom's income?
- ⦿ Should you attribute part of mortgage and utility bill to son?

BROWN V. BROWN

- ◉ Impute rental income?
 - Not without bad faith
- ◉ Share expenses?
 - Not if expenses are otherwise reasonable

ANNULMENT

- ⦿ No default judgment
 - Even as Rule 37 discovery sanction
 - *Thompson v. Hawkins*
- ⦿ All allegations in “divorce” pleadings are deemed denied
 - GS 50-8
 - *See Phillips v. Phillips*, 185 NC App 238(2007)(alimony)
- ⦿ Court must find facts
- ⦿ Role of default in “divorce” cases ????